IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 656 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

DHANJJI KARSHAN PATEL

Appearance:

1. Criminal Appeal No. 656 of 1991

MR KC SHAH A.P.P. for Appellant No.

MR NALIN K THAKKER for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 02/07/2004

ORAL JUDGEMENT

The State of Gujarat has approached this Court under Section 378 of the Criminal Procedure Code, 1973 challenging the judgment and order of acquittal passed by

the learned Chief Judicial Magistrate, Kutch at Bhuj dated 22nd February, 1991 in Criminal Case No. 5655 of 1987. By the said judgment, the respondents have been acquitted of the offences charged against them under Section 7 read with Section 16 of the Prevention of Food Adulteration Act [hereinafter referred to as "the Act"].

2. The case of the prosecution is that on 18th October, 1986, the Food Inspector Mr. R.P. Christian who then was attached to the Food & Drugs Control Administration at Gandhinagar, was on his usual round and in the course of the same, he visited Sahjanand Ice Factory, which manufactured ice candies. He expressed his desire to purchase sample of the ice candy for the purpose of analysis. He thereafter collected the sample in a vessel and divided the same into three parts. Thereafter, he filled the sample in three glass bottles and completed its sealing and packing in the manner prescribed under the provisions of Prevention of Food Adulteration Rules. One sample was thereafter sent to the laboratory of Public Analyst at Rajkot. The remaining two samples were forwarded to the Local Health Authority at Bhuj. On receipt of the report from the Public Analyst, it was found that the sample did not conform to the standard prescribed under the Act as well as the Rules and hence, it was found to be adulterated. Mr. Christian therefore, forwarded a copy of the report alongwith other relevant material to the Local Health Authority for obtaining its consent under Section 20 of the Act. It appears from the record that Mr. Christian was thereafter transferred and in his place Mr. Mukesh Amrutlal Saraiya was posted, who filed complaint on receiving the consent from the Local Health Authority. He also forwarded a copy of the report together with the complaint to the respondents under the provisions of Section 13 (2) of the Act and intimated them that, if they so desire, they could make an application for getting the sample analyzed by the Director of Central Food Laboratory. In response to the same. the respondents appeared before the learned Magistrate and made an application for sending the sample to the Director of Central Food Laboratory. The said application was granted and one of the sample lying with the Local Health Authority was summoned and it was duly sent by the learned Magistrate after complying with all the formalities to the Director of Central Food Laboratory. The report of the Director of Central Food Laboratory was received, which also showed that the sample was adulterated.

2.1. Since the respondents pleaded guilty to the

charge, they were tried. The prosecution in support of his case examined witnesses as well as produced documentary evidence. The then Food Inspector Mr. Christian was examined as prosecution witness no. 2 at Exh.47, whereas his successor Mr. Mukesh Amrutlal Sariya was examined as prosecution witness no. 1 at Exh.21.

2.2. The prosecution also placed reliance on the documentary evidence, such as the reports of Public Analyst as well as the Director of Central Food Laboratory etc.

2.3. On conclusion of the trial, the learned Magistrate, passed the order of acquittal, mainly on the ground that the consent accorded by the Local Health Authority under Section 20 did not reflect application of mind and, therefore, the accused was entitle to be acquitted. It is this order of acquittal which is under challenge.

3. Mr. K.C. Shah learned A.P.P. has assailed the judgment and submitted that the ground of non application of mind while granting consent is absolutely erroneous and it cannot be sustained. He has further submitted that while according consent the Local Health Authority is not required to specify reasons for it. He has placed reliance on several decisions of this Court.

3.1. As against that Mr. Nalin Thakker learned advocate for the respondents has supported the judgment of the learned Magistrate and has also submitted that the consent accorded by the Local Health Authority clearly reveals that there was non application of mind by the Local Health Authority as no provisions of law has been stated in the same. He has further submitted that the evidence of the Food Inspector clearly shows that the vessel in which the sample was collected was not clean and, therefore, benefit of doubt should be given to the respondents. He has also submitted that at the time when the order of acquittal was passed, the law was that the Local Health Authority was required to assign reasons for grant of consent. If subsequently, the law undergoes change, even by way of the decision of the Court, the accused should not be convicted. He has, therefore, prayed that the appeal be dismissed.

4. I have carefully gone through the record of this appeal with a view to reappreciate the evidence and I have carefully considered the rival submissions. The evidence of the Food Inspector who collected the sample namely Mr. Christian shows that when he had visited the

factory of the respondents, he had purchased ice candy for the purpose of analysis. He had taken out sticks from the candies and the frozen part of it was collected in a vessel. In the cross-examination of the defence, he has stated that he did not carry any vessel with him, though ofcourse, he also states in his evidence that the said vessel in which candy was collected was clean and it was shown to the accused. However, it is not on record, from whom he had got the vessel, since he had not carried it with him. The helper was with him, but he has not been examined. There is no evidence to show that it was the Food Inspector who cleaned the vessel himself or who got it cleaned by anyone else. No one else has been examined on this point. When there is no satisfactory evidence with regard to the cleanliness of the vessel in which the sample was collected, it renders the case of the prosecution vulnerable. Time and again this Court has stated that the prosecution is required to lead cogent and reliable evidence that the container in which the sample was collected for the purpose of analysis was clean and dry.

4.1. This Court [Coram : V.V. Bedarkar, J.] in the case of M.B. Risaldar v. Radheshyam Ramdhar Agarwal & Anr. reported in Vol. XXI (2) G.L.R. at p.136 has held as under :-

"It is the submission of Miss Valikarimwala that the evidence of the Food Inspector Manubhai Pandya very categorically showed that he had transferred the samples in three glass bottles which were cleaned and dried. It is her submission that when the food inspector has stated so in clear terms, it should be presumed that he had followed the official act properly and the learned Magistrate should not have doubted that testimony. I quite agree with her that if the testimony of the food inspector had remained as it was, then there was no ground to doubt it and the court was not justified in creating a doubt. But during the cross-examination, questions were put to the food inspector specifically as to under what circumstances he found that the bottles were dried and cleaned. For that, he has merely to say that looking to the bottles by naked eyes, he found them to be dried and cleaned. He was put specific questions and he stated that the utensil and the bottle were taken by him from his cupboard. He did not know how many bottles were there in his cupboard at at that time this can be

justified because of the time of deposition one would not know how many bottles were there in the cupboard when he went for raid. He may not also know as to when those bottles were used. But the important evidence is that the bottles were kept in the cupboard by his peon after washing. He could not say when they were kept. He also could not say when the peon washed the bottles. All this evidence can be appreciated because he may not remember when the peon washed the bottles at time of deposition nor can he remember as to when they were put in the cupboard. The most important answer is that the bottles were washed by peon Bagare according to his instructions. But then he had to admit that they were not washed in his presence. So all the evidence given by him that bottles were dried and cleaned and they were cleaned and put by the peon under his instructions goes away by a sentence that they were not washed in his presence. If the bottles are not washed in his presence, how can it be said that they were cleaned by the peon according to his instructions and direction ? In order to prove that instructions were properly followed, the person who gives instructions has to testify that actual procedure was done in his presence according to his instructions. If he does not say so and merely states that the peon washed the bottles according to his instructions, it is merely a statement on assumption and not a statement of fact. On this count, the learned Magistrate relied on an unreported judgment printed at 1977 U. C.R. (Bom.) 530, which is a judgment of Jahagirdar, J. in the case of the State of Maharashtra v. Ram Murat Dube, in Criminal Appeal No. 98 of 1976 decided on 15th April, 1977. In that case, evidence was given by the food inspector that he did not clean or dry the bottles in which samples were taken. But he deposed that, that part of the work was done by his assistant. To a pointed question in the cross-examination, he admitted that he did not know when the assistant did it. On this evidence, the Bombay High Court held that it was, therefore, impossible to hold that the food inspector who has been examined proved that the bottles were cleaned or dried as required under the Rule. This could have been proved by the assistant who is alleged to have done that part of the work.

7. There is no judgment of this Court or the Supreme Court showing to the contrary. Even, I feel that when a witness testifies to the effect that the glass bottles were cleaned and dried, a mere visual appearance to the naked eye may not be sufficient sometimes. If no questions might have been put to him as to how he can say that the glass bottles were cleaned and dried, probably the matter would have ended there. But he has given out that the peon had cleaned and dried the bottles and put them into the cupboard. In this state of the evidence, it was the duty of the prosecution to examine that peon to show that bottles were properly cleaned and dried and they were put into the cupboard and properly closed. It is true that I would not go to the extent of observing as the learned Magistrate has done that there might be some microscopic dirt remaining in the bottle. But then there should be evidence that it was properly cleaned and if that direct evidence is there and then after looking by a naked eye also, the bottles looked cleaned and dried, then the matter is with the prosecution. But if the evidence is not there, then benefit of that must certainly go to the accused."

4.2. Similar view has been taken by the learned Single Judge [Coram : B.C. Patel, J.] in the case of State of Gujarat v. Bhupendra M. Mehta reported in 1999 (1) G.L.H. 227 at p.227

"8. So far as the question with regard to dry and clean bottles not used by the Food Inspector is concerned, Mr. Vora invited the attention of the Court to the evidence wherein the Food Inspector has stated that the sample was poured in three dry and clean bottles. However, in the cross-examination, the Food Inspector has stated as under :-

"Bottle, sample Bottles, were..... ..... before eight days. For about eight days were lying in my custody in the office."

8.1. The original record is perused by the Court. In the original record, evidence recorded in Gujarati reads as under :

"Batli, sampleni bottloe officema Saat divas agavu ..... karel"

8.2. Reading the evidence, what appears is that some action is taken before eight days - whether the action was of cleaning the bottles or purchasing the bottles before eight days, is not known. In the absence of specific word, the Court cannot put in the mouth of the witness though the witness has not stated it. It may be a bona fide mistake of the person while recording the evidence. This is the second case, which I have come across while dealing with food adulteration cases in this session where the evidence is not properly taken down, and for the reasons, the accused are required to be acquitted. In the earlier case, (Criminal Appeal No. 50 of 1991 decided on 17-9-1998/18-9-1998), it is pointed out by this Court that it is the duty of the Trial Court to see that evidence is read over to the witness.

9. Mr. Vora submitted that a specific question was put about the cleaning of the bottles, but there is no answer by the witness and what is stated is that the bottles were lying in his custody for eight days. Therefore, the bottles were cleaned or not, is not established by the prosecution. He further submitted that the Food Inspector has not stated that he himself has cleaned it or under his supervision the bottles were cleaned and thereafter, the bottles were properly kept. It is required to be noted that duty is cast upon the prosecution not only to comply with the mandatory provision of law by using clean and dry bottles for storing the sample but also to satisfy the Court by leading evidence at the Trial Court that the bottles used were clean and dry. In the case of M.B. Risaldar v. Radheshyam reported in 21 (2) G.L.R. 136, this Court has observed as under :-

"Even, I feel that when a witness testifies to the effect that the glass bottles were cleaned and dried, a mere visual appearance to the naked eye may not be sufficient sometimes, if no questions might have been put to him as to how he can say that the glass bottles were cleaned and dried, probably the matter would have ended there. But he has given out that the peon had cleaned and dried the bottles and put them into

> the cupboard. In this state of the evidence, it was the duty of the prosecution to examine that peon to show that bottles were properly cleaned and dried and they were put into the cupboard and properly closed."

9.1. In the instant case, if in the evidence the words would have been to the effect that the bottles were cleaned before eight days, and were kept in the cupboard, the Court would not have any hesitation in accepting the same, but as the sentence is not correctly written, it is difficult to say whether it refers to "purchasing" or "cleaning" of the bottles. Therefore also, the benefit should go to the accused."

Thus, the law on this aspect is very clear. Hence there is no hesitation on my part to hold that the prosecution had failed to establish the guilt of the respondents beyond reasonable doubt because, there was no satisfactory evidence on record with regard to the vessel in which the sample was collected being dry and clean. Since, I am inclined to uphold the order of acquittal on this ground alone, I am not entering into other issues which have been agitated.

In the result, this appeal fails and it is dismissed.

[AKSHAY H. MEHTA, J.]

/phalguni/